IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 201

ROBERT DRAPER and RAYMOND LORENTZEN,
Petitioners,

v.

WASHINGTON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS

JOSEPH J. REKOFKE
JOHN J. LALLY, Prosecuting Attorney
GEORGE A. KAIN, Deputy Prosecuting Attorney

Attorneys for Respondents

Spokane County Court House
Spokane, Washington

INDEX

TABLE OF CASES

TABLE OF CASES (Cont'd)

COURT RULES

CONSTITUTIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 201

ROBERT DRAPER and RAYMOND LORENTZEN,
Petitioners,

v.

WASHINGTON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS

RESPONDENTS' STATEMENT OF THE CASE

On the afternoon of July 4, 1960, the three defendants, Draper, Lorentzen and Long, were in Spokane, Washington, and drove an automobile to the home of Robert Jennings, located near Addy, Washington, approximately fifty miles north of Spokane. When they arrived at the Jennings' residence, the defendant, Robert Draper, went inside, and, after some conversation there with Robert Jennings and his mother, Gladys Allen, Draper persuaded Jennings to accompany him back to Spokane with the other two men

(R. 21). When they returned to Spokane, they went to a room at the Davenport Hotel which Robert Draper had rented earlier that day, using the name "J. Radde" (R. 21). In this hotel room in the late evening of July 4, 1960, these four men planned in advance to commit the armed robberies of the TraveLodge Motel and the Downtowner Motel, both in Spokane. For this purpose the four men even went to the extent of making a "dry run" over the exact route later taken in the actual robberies for the purpose of planning and timing these holdups (R. 21).

At approximately 1:50 a.m. of July 5, 1960, the four men drove in an automobile to the TraveLodge Motel, located in downtown Spokane (R. 19). The evidence reflected that this TraveLodge Motel was owned and operated as a motel business by a partnership consisting of H. E. Swenson, Dr. C. W. Anderson and the TraveLodge Corporation, doing business under the name of the TraveLodge Motel, and further that at this early hour of the morning of July 5, 1960, the only employee on duty at the motel was the night clerk, Robert Deurbrouck (R. 24). When the four holdup men drove in front of the TraveLodge Motel, the defendants, Raymond Lorentzen and James Long, went in (R. 19). Each man, being armed with a loaded gun, held up Robert Deurbrouck and obtained from him approximately $500.00, which belonged to the TraveLodge Motel (R. 19). Thereupon, for no reason what-

ever, James Long then ordered Deurbronck to turn around and, when the latter did so, Long struck the night clerk over the head with the butt of a gun, inflicting a scalp wound which later required four stitches (R. 19-20).

Lorentzen and Long then ran back to the waiting vehicle, where the defendant, Robert Draper, and the accomplice, Robert Jennings, were waiting by prearrangement, and, in accordance with this prearranged plan, the defendant, Robert Draper, drove this automobile a few blocks south in the heart of downtown Spokane to the Downtowner Motel. At this motel, the accomplice, Robert Jennings and the defendant, James Long, went inside, each again armed with a loaded weapon, and held up the night clerk on duty at the Downtowner Motel, a young man by the name of Barry Roff (R. 20). Evidence showed that the Downtowner Motel is a corporation engaged in the general motel business in Spokane (R. 24). This holdup netted the four men approximately $1,800.00 (R. 20). Robert Jennings then repeated what had been inflicted upon Robert Deurbronck a few minutes earlier, and struck the clerk, Barry Roff, over the back of the head with the butt of a gun (R. 20). The two holdup men then ran back to the waiting automobile which was being driven by Robert Draper and in which Raymond Lorentzen was waiting with Draper, and they drove off (R. 20).

As they did so, a police officer, Donald Rafferty, who was on patrol in the downtown area of Spokane, observed Jennings and Long run from the motel and jump into the waiting automobile, so Officer Rafferty followed this vehicle for a few blocks until he heard over his police radio that there had been a holdup at the Downtowner Motel (R. 20). Officer Rafferty then tried to stop the vehicle, but it took off at a high rate of speed, with Officer Rafferty in pursuit. Another police officer, Robert Bailor, joined the pursuit over a distance of many blocks in downtown Spokane, and as the pursuit was under way at speeds of up to sixty miles an hour, the defendants fired a number of pistol shots at the pursuing police cars (R. 20). Finally, this vehicle being driven by Draper was rammed by Officer Bailor's police car at an intersection. This, of course, took place only a minute or so after the holdup of the Downtowner Motel (R. 20). In the ensuing melee, Robert Draper and Robert Jennings fled and escaped, but the defendants, Lorentzen and Long, were captured at the scene of the collision, along with the complete proceeds of the two robberies (R. 20). This included other property, which was identified at the trial as coming from the TraveLodge Motel and the Downtowner Motel by employees of the respective motels (R. 20). Long immediately confessed his participation in these robberies (R. 20).

When Draper and Jennings fled, they returned to Draper's room at the Davenport Hotel, where they spent the remainder of the night of July 4-5, 1960. Draper had previously registered at the hotel under the name "J. Radde" (R. 20, 21, 26). The next morning, Draper left the Davenport Hotel and booked a flight to Seattle, Washington, on a Northwest Airlines plane, using the name "J. Radde." When apprehended the following day in Seattle, he still had in his possession the airline ticket under the name of "J. Radde" (R. 21).

The accomplice, Robert Jennings, entered a plea of guilty to the aforementioned two counts of robbery in the Superior Court, on July 19, 1960, and was sentenced to not more than twenty years' confinement on each count, the sentences to run consecutively (R. 21).

The accomplice, Robert Jennings, testified at the trial of these three defendants to every detail of the preparation, planning and execution of the two robberies, as well as the subsequent flight of himself and Robert Draper (R. 21). His testimony was confirmed by the testimony of his mother, Gladys Allen, who identified Draper as having been at the Jennings' residence on the afternoon of July 4, 1960 (R. 26).

The trial of Draper, Lorentzen and Long was held on September 12, 13 and 14, 1960 (R. 19). After the state rested its case, the defendants did not take the stand and offered not a word of testimony or evidence

in their own behalf (R. 22). The jury returned verdicts of guilty on each count as to each of the three defendants, and, on September 30, 1960, they were sentenced to serve not more than twenty years in the Washington State Penitentiary on each count, the sentences to run consecutively (R. 23).

A notice of appeal was filed on the 20th of October, 1960, by each of the petitioners (R. 8, 9). Thereafter, and on the 28th day of November, 1960, a hearing was held before the sentencing Judge, the Honorable Hugh H. Evans, Judge of the Superior Court for Spokane County (R. 23, 32). This hearing was on the defendant's motion and affidavit *in forma pauperis* for a free transcript and statement of facts (R. 10-13, 32). The state filed a counter-affidavit resisting the motion for a free statement of facts. This counter-affidavit set forth the essential facts brought out in the trial (R. 19-22). Present at this hearing were the petitioners and their attorney, Mr. Thomas F. Lynch (R. 32, 33). Mr. Lynch had been appointed to defend Draper, Lorentzen and Long in the jury trial, inasmuch as they had chosen Mr. Lynch to represent them and, because they had insufficient funds, a court-appointed attorney was necessary, and the trial court appointed Mr. Lynch in that capacity (R. 33-34). At the hearing on the motion to proceed *in forma pauperis* and for a free transcript and statement of facts, the Attorney, Thomas F. Lynch, and petitioner, Robert Draper, were asked

questions by the trial Judge which related to the factual basis for the petitioners' contentions of error, and to which questions the petitioners could supply no answers. The attorney and the petitioner, Robert Draper, made extended arguments before the trial Court during this hearing (R. 34-39, 39-45).

On the 12th day of December, 1960, the aforesaid Judge, having concluded that the contentions of the petitioner were frivolous, entered findings of fact and conclusions of law based upon the previous hearing, and also entered an order denying the motion for a free transcript and statement of facts (R. 23-30).

On the 13th day of February, 1961, petitioners obtained an order for writ of certiorari from the Supreme Court of the State of Washington to review the order denying a free transcript and the statement of facts. In this order the trial court was directed to deliver the stenographic report of the hearing conducted in the trial court and a transcript of all proceedings relative to the motion for a free statement of facts in accordance with the rules announced in *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959) (R. 58, 59).

The Supreme Court of the State of Washington had before it for consideration respecting the facts: The petitioners' motion and affidavit (R. 10-13), the State's counter-affidavit (R. 19-22), the reporter's

transcript of the factual summary of both the state and the petitioners during the hearing on the motion for free statement of facts (R. 32-53), and the trial court's findings of fact (R. 23-28). The facts as found by the trial court were not challenged by the petitioners.

On September 28, 1961, Department One of the Supreme Court of the State of Washington, all five judges concurring, rendered an opinion quashing the writ of certiorari (R. 77-82). Petitioners' attorney, Thomas F. Lynch, also appeared on behalf of the petitioners in argument on the writ of certiorari. The official report of this opinion, specifying appearance by counsel, is found at 58 Wn. (2d) 830, 365 P. (2d) 31 (1961).

QUESTIONS PRESENTED

Whether Equal Protection of the Law and Due Process of Law is denied to an indigent defendant by the State of Washington requiring the observance of those minimal requirements as set forth in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), as a condition to the granting of a free statement of facts on appeal.

ARGUMENT

I.

Due Process of Law and Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution do not require a State to supply a free transcript of the trial record to all indigent defendants who merely ask for the same.

That appellate review of a conviction entered by a state court is not essential to due process of law is established by the case of *McKane v. Durston*, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1893).

A review of the cases decided by the Supreme Court of the United States over the past seven years, commencing with the case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), leaves little doubt that the dictates of due process require that, if a state does choose to grant appellate review, that state cannot at the same time deny appellate review to an indigent defendant merely because of his poverty.

The majority opinion in the *Griffin* case, *supra*, contains the following language:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it . . . The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

In the concurring opinion of the *Griffin* case, *supra*, Justice Frankfurter implemented language intended to limit the indiscriminate expenditure of public funds:

> "When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

The foregoing language appears to be a suggestion that state courts create, by rule making power, some definite standard for enabling the indigent defendant, who possesses meritorious grounds for appeal, to perfect his appeal, and without violation of due process of law or equal protection of the laws, to prevent the squandering of public funds in those cases where an appeal would be a patently frivolous act.

The Supreme Court of the State of Washington in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), set forth standards intended to solve this problem. In the *Woods* case, *supra*, all nine judges of the Supreme Court of the State of Washington concurred in an opinion setting forth the standards for determination of the question as to whether a full statement of facts is essential to an

appeal in a particular case. As a prelude to setting forth those rules, the court held that:

> "Where an indigent defendant desires to exercise his right of appellate review, a court may protect his right without approving the expenditure of public funds for an unnecessary portion of the stenographic transcript of the evidence. The wanton expenditure of the taxpayers' money on an appeal made without serious purpose is not a right envisaged by our state constitution.
>
> "...
>
> "However, in *Farley v. United States*, 354 U.S. 521, 1 L. Ed. (2d) 1529, 77 S. Ct. 1371, the court held that leave to appeal *in forma pauperis*, upon the conviction of a crime, could not be denied on the grounds that the appeal was frivolous where the defendant's contention was that the evidence was insufficient to sustain the conviction, the court stating that it was quite clear that the appeal could not be characterized as frivolous.
>
> "Since *Griffin v. Illinois*, *supra* (1955), the extent of the right of an indigent defendant to obtain a free statement of facts to insure him an adequate appellate review has been a recurring and troublesome question. The difficulty has arisen because of the lack of precedent to guide the trial courts in considering the substantiality of the errors claimed, and in determining what portion of the record is necessary to adequately review the claimed errors.
>
> "To aid the trial court in passing upon these matters, this court hereby prescribes the following procedure:

"1. An indigent defendant in his motion for a free statement of facts must set forth:

"a. The fact of his indigency

"b. The errors which he claims were committed; and if it is claimed that the evidence is insufficient to justify the verdict, he shall specify with particularity in what respect he believes the evidence is lacking. (The allegations of error need not be expressed in any technical form but must clearly indicate what is intended.)

" . . .

"3. The trial court in disposing of an indigent's motion for a statement of facts at county expense shall enter findings of fact upon the following matters:

" . . .

"b. Which of the errors, if any, are frivolous and the reasons why they are frivolous."

The purpose of the rule as set forth above, in part, is to require, prior to the expenditure of public funds, that the defendant specify with particularity what evidence he feels is insufficient. The reason for this rule is obvious. If all that a defendant must do to obtain a statement of facts at public expense is to allege in general that the evidence is insufficient, or that substantial error occurred, then all applicants for a transcript would undoubtedly make such allegation. The allegation can be made no matter how spurious

its foundation and no matter how groundless the appeal. To require the public to provide a statement of facts on the mere assertion by a defendant that the evidence is insufficient, or that trial errors occurred, in practice, is equivalent to requiring the public to provide a statement of facts or transcript in all cases. This court, in the case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), made it clear that this is not intended.

The rule set forth by the Supreme Court of the State of Washington in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), provides a workable solution to this problem. That rule imposes no unreasonable burden on the defendant in requiring him to enumerate exactly what evidentiary deficiency occurred in the trial. At the same time, the rule permits the courts to relieve the public of the expense of frivolous appeals. The respondent submits that this rule is reasonable and fair to the indigent defendant and the public alike.

II.

The Washington case of In re Woods v. Rhay equates a monied defendant and an indigent defendant with respect to the restrictions on the preparation of a transcript for the purposes of appeal.

The petitioners contend that the rules as set forth by the Supreme Court of the State of Washington in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P.

(2d) 332 (1959), result in a denial of due process of law and equal protection of the law, because an indigent defendant has only a conditional right to appeal, whereas a defendant with money suffers no impediment to an appeal on the merits. The argument of petitioners, in effect, is that any time an indigent defendant asks for a free transcript and statement of facts, the trial court has no choice but to grant this request. However, as previously indicated, the case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), did not so hold.

The practical result of the case of *In re Woods v. Rhay, supra*, is that the indigent and a defendant with money are equated with respect to the taking of an appeal. A defendant who has sufficient money to pay for a transcript on appeal must reach a decision with regard to whether it is feasible to appeal from his conviction. His decision is obviously restricted by a desire not to throw good money after bad. If the appeal would be a useless thing, obviously the rich man will not appeal. In effect, then, a defendant who is financially able to prosecute an appeal is deterred when the appeal would be a useless act.

An indigent defendant has no such monetary restrictions upon his decision to prosecute an appeal, since he draws on the State's Treasury which to him is inexhaustible. The Supreme Court of the State of Washington in the case of *In re Woods v. Rhay, supra*, set

forth rules for the purpose of equating the two considerations just mentioned. In the case of *In re Woods v. Rhay*, *supra*, the Supreme Court of the State of Washington requires only that the petitioner seeking a free statement of facts set forth the error allegedly committed by the trial court so as to "clearly indicate what is intended." The Supreme Court of the State of Washington then has an opportunity to review the trial court's decision on the motion for a free statement of facts for the ultimate determination as to whether as a matter of law the appeal would be a frivolous one.

It is submitted that this requirement places no undue burden on the indigent defendant. It does not favor the defendant who is able to pay for his own statement of facts, but equates the rich man's sense of thrift in the face of futility with the indigent defendant's duty to make a minimal showing that the State's money would not be spent for a completely useless act. The case of *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1955), in substance, requires that the State must provide *as* adequate appellate review for the indigent defendant as it provides for a defendant with money. The *Griffin* case, *supra*, did not hold that the State must provide *more* adequate appellate review for the indigent.

The petitioners assert that in the State of Washington there is no provision restricting the appeal of a

defendant with money. However, Rule 51 of Rules on Appeal, RCW, Vol. "O," Appeal — p. 28, provides as follows:

> "Motion to dismiss. Any respondent may move the supreme court to dismiss an appeal . . . *on any ground going to the merits of the further prosecution of the appeal* . . . ; and there may be combined with a motion to dismiss, a motion to affirm the judgment or order appealed from, or a motion for damages on the ground that the appeal was taken merely for delay . . . "

It thus appears that, if a monied defendant appealed on a basis which was legally inadequate, his appeal could be stricken by summary action in the State of Washington. Respondents were unable to find any decision of the Supreme Court of the State of Washington which involves a criminal case construing this court rule.

III.

Washington Practice, by virtue of the Case of In re Woods v. Rhay, does not result in a summary denial of a free transcript by the same trial court that denied the motion for post-trial remedies.

The petitioners contend that the Washington practice results in an arbitrary denial by the trial court of an indigent defendant's right of review because, in practical effect, the Supreme Court of the State of Washington reviews nothing but the trial court's conclusion.

The petitioners contend that the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), suffers from the very same inadequacy that caused this court to reverse the case of *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 2 L. Ed. (2d) 1269, 78 S. Ct. 1061 (1958). In *Eskridge v. Washington State Board of Prison Terms and Paroles, supra*, at p. 215, the opinion states:

> "The trial judge denied this motion, finding that 'justice would not be promoted . . . .'"

This procedure provided the Supreme Court of the State of Washington with nothing to review other than the trial court's conclusion, and the Supreme Court of the State of Washington had absolutely no factual background upon which to evaluate the trial court's decision.

The case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), makes it clear that the Supreme Court of the State of Washington was seeking to remove those objections which this court made in the case of *Eskridge v. Washington State Board of Prison Terms and Paroles, supra*. In the State of Washington, under the rules set forth in the case of *In re Woods v. Rhay, supra*, the trial court does not merely conclude that the appeal would be a frivolous one, but the trial court must make findings of fact as well as conclusions.

The denial of such a motion by the rules themselves permits a review to the Supreme Court of the State of Washington. The Supreme Court of the State of Washington has the following factual matter to review when considering the trial court's denial:

1. The petitioner's affidavit attached to the motion to proceed *in forma pauperis*.
2. The State's affidavit resisting the aforesaid motion.
3. The reporter's transcript of the facts as brought out in oral argument at the hearing on this motion in the trial court.
4. The trial court's findings of fact.
5. The facts alleged in the briefs of both parties, filed in the Supreme Court of the State of Washington.
6. The facts as orally argued by both parties before the Supreme Court of the State of Washington.

It is clear from the record that the Supreme Court of the State of Washington permits the consideration of additional facts raised for the first time before that court (R. 81):

> " . . . these allegations are too broad and indefinite to indicate what specific erroneous rulings of the court the defendants had in mind, and *they*

have not been made more definite by the briefs before this court." (Emphasis supplied.)

The final determination, even on the facts, is not made in the trial court, but is made in the Supreme Court of the State of Washington. Therefore, there is no summary denial by the trial court of a defendant's request for a free statement of facts under the existing Washington practice. The respondents submit that the rules presently in effect in the State of Washington, as set forth in *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), meet the requirements imposed on the states under the Equal Protection of Law and Due Process of Law clauses of the Fourteenth Amendment to the United States Constitution.

IV.

Petitioners, by reason of their refusal to follow the rules set forth in the case In re Woods v. Rhay, prevented the trial court from designating any part of the trial record as necessary for appellate review.

The petitioners, Mr. Draper and Mr. Lorentzen, did not observe the rules as set forth in *In re Woods v. Rhay, supra*, in the respect that they set forth errors which they claimed were committed, but the specifications did not "clearly indicate what is intended," and they did not "specify with particularity in what respect he believes the evidence was lacking." The petitioner, Mr. Draper, was aware of these rules (R. 40, 43). The petitioner's counsel was also familiar with

this case (R. 36). The petitioner's attorney, who was an experienced criminal lawyer, was unable to specify any error, with minor exceptions which were legally inadequate. Respondents submit that the reason for this inability was that there was no factual basis for any of the claims of error.

The petitioner, Mr. Draper, sought to circumvent this inability to specify any real error by the following means: The petitioners had a capable attorney, who represented them in presenting the motion, and before the Supreme Court of the State of Washington, but rejected the services of this attorney after the convictions resulting in the trial court. The petitioners thus placed themselves in the position of being indigent laymen without the advice of counsel, and the petitioner, Mr. Draper, made this quite clear to the trial court (R. 34, 39). This permitted him to argue that he was unqualified to specify what errors, if any, had been committed, as was required by the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959). The petitioner, Mr. Draper, then argued before the trial court that, because he had no attorney and no legal training, it was necessary for him to read the whole record in order to be able to specify the trial court's error, and that, therefore, he must have the whole statement of facts to comply with the rules set forth in *In re Woods v. Rhay, supra*, (R. 39, 44).

The purpose of the rules set forth in *In re Woods v. Rhay, supra*, was to require the indigent defendant to advise the trial court of the error alleged so that, if the allegation was not a frivolous one, the trial court would then be in a position to designate that portion of the statement of facts necessary for appeal. The petitioners made it impossible for the trial court to designate any part of the record as necessary to perfect an appeal.

The petitioners complain that the trial court should have made a finding with respect to whether a narrative statement would be adequate. The petitioner, Mr. Draper, made it clear to the trial court in his oral argument that he would not accept a narrative statement of facts. He made it clear that he wanted *only* the official transcript and that he wanted *all* of the official transcript to browse through (R. 39):

> "I will have to have the entire record in order to enable me to prepare my appeal, and anything less than that would be denying me what I need to proceed upon, and the two men charged here with me would need the same thing. We have no funds with which to hire a lawyer to prepare an appeal, or to prosecute it, and without this record we have nothing to work from, and nothing to work on.
>
> "I don't know what the law says, I must just look through all the record to find what I need, and I want all of it transcribed to start from."

The trial court, during the hearing on the motion for a free transcript, asked various questions in order to properly lay the foundation suggested in the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 322 (1959). Neither the counsel for the petitioners nor the petitioners were able to answer the questions because there was no basis in fact for the allegations of error. A good example of this is indicated by the colloquy that occurred during the argument when the petitioner, Mr. Draper, alleged that witnesses were in the court room after the rule of exclusion was in effect (R. 43):

> "The Court. You have affidavits of someone that these two people were in the courtroom, these witnesses, who were not supposed to be?
>
> "Mr. Draper. Yes, that is right.
>
> "The Court. Where are they?
>
> "Mr. Draper. I have talked to them. I didn't know that an affidavit was proper, so I didn't get one.
>
> "The Court. Who are they?
>
> "Mr. Draper. I don't have to answer that, and I am not going to answer that."

The trial court could hardly be in a position to specify what portion of the record should be made available to the petitioners, if the petitioners would not advise the court of anything more than a bare

claim of error. The respondents submit that the inability of the petitioners to "clearly indicate what is intended" with respect to their claims of error is due to a factual absence of any basis for these claims.

V.

The petitioners, as a matter of law, had no basis upon which to prosecute an appeal and, consequently, the final decision of the Supreme Court of the State of Washington was a proper one.

Petitioners, in their brief, argue only four of the thirteen original allegations of error. These allegations of error and their disposition will be hereinafter set forth:

With respect to allegation of error No. 6 (R. 41):

> " . . . that the trial judge was prejudiced against the defendants throughout the entire trial."

the petitioners' attorney mentioned this allegation to the trial court, but said nothing about it (R. 37). The petitioner, Mr. Draper, mentioned this allegation to the trial court, but could supply no information as to the basis for the claimed error (R. 41). The trial court indicated that petitioners had not supplied him with any information as to any facts pertaining to this allegation of error (R. 50). The allegation of error did not "clearly indicate what is intended." This was

an obvious disregard of the rules set forth in *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959). The Supreme Court of the State of Washington, in reviewing the foregoing disposition, held that the petitioners, as a matter of law under these facts, had no basis to appeal, citing *State v. Innocenti*, 170 Wash. 286, 16 P. (2d) 439 (1932). The Supreme Court held that this assignment of error was patently frivolous (R. 80, 81).

With respect to the allegation of error No. 7 (R. 41):

> " . . . that the trial judge should have dismissed the case as the defendants are not guilty as charged,"

again, the petitioners did not indicate what insufficiency occurred in the evidence, but made only the conclusion (R. 41):

> "The basis of the case was not upheld, it should have been dismissed and dropped."

The rule in *In re Woods v. Rhay, supra*, to the effect that the petitioner shall "specify with particularity in what respect he believes the evidence is lacking" was not observed by the petitioners. The Supreme Court of the State of Washington, when reviewing this allegation of error, held as a matter of law that the evidence was sufficient under the facts (R. 79, 80):

"It is clear from the summary of the evidence which the trial court outlined in its order, *the correctness of which outline the defendants do not challenge*, that all of the elements of the crime of robbery were established by the evidence. (Emphasis supplied).

" . . . The evidence outlined above, which the jury was entitled to believe, was sufficient proof to support the convictions."

While the petitioners did contend to the trial court that there was a failure to prove that the victims of the robberies had corporate status, the Supreme Court ruled against this contention as a matter of law. The proof of ownership of property involved in a robbery is unnecessary. Citing *State v. Hatch*, 63 Wash. 617, 116 Pac. 286 (1911) (R. 81).

The petitioners alleged that the trial court committed error as set forth in assignment of error No. 8 (R. 41):

". . . that exhibits were entered over objections that should not have been allowed to be entered."

The petitioner, Mr. Draper, by way of indicating what he intended regarding this allegation of error, had only this to say (R. 41):

"You can't just bring something into court and say, 'This is so and so,' and establish a fact that way, but that is what happened with half of the evidence that was used here."

The petitioner, Mr. Draper, argued that there was no continuity of possession of the exhibits, and then stated (R. 40):

> " . . . and I know that the Courts have great discretion as to what things to admit and what things not to admit . . ."

The petitioners' attorney himself stated with respect to a gun admitted in evidence (R. 38):

> "I suppose that goes to the weight of the evidence here."

Nothing further from a factual basis was mentioned by the petitioners or their attorney with respect to this allegation of error. The Supreme Court of the State of Washington in reviewing this allegation of error held (R. 80):

> " . . . it is stated that the clothes and weapons introduced in evidence were not properly identified nor their ownership established. This goes to the weight of the evidence and not to its admissibility."

They further held (R. 81):

> " . . . these allegations are too broad and indefinite to indicate what specific erroneous rulings of the court the defendants had in mind, and they have not been made more definite by the briefs before this court."

The petitioners, by way of allegation of error No. 9, asserted (R. 41):

". . . that testimony was allowed over objections that should not have been allowed."

The petitioner, Mr. Draper, set forth the facts upon which this contention was based as follows (R. 41):

> "I think that speaks for itself. There is testimony which was objected to but which was allowed to stand, and in some cases you instructed the reporter to have it stricken from the record, and there was nothing in the instructions to contradict that, and any time you speak in court, that is an instruction, if it is not directed to the prosecutor or to defendant's counsel, the jury listens to it all.
>
> "The Court. What did I say?
>
> "Mr. Draper. If you offer an opinion, or a thought, or anything to show how you feel.
>
> "The Court. What did I do?
>
> "Mr. Draper. I don't remember, because I don't have the transcript, but I remember a very great feeling at the time of the trial over this."

The petitioner, Mr. Draper, also contended that the witness, Jennings, had perjured himself, but was unable to indicate anything with respect to what testimony was perjured or when it occurred in the trial (R. 40, 41). The trial court held that there was no showing of any testimony having been improperly admitted (R. 27, 28). The Supreme Court of the State of Washington in reviewing this allegation of error held that (R. 81):

> " . . . these allegations are too broad and indefinite to indicate what specific erroneous rulings of the court the defendants had in mind, and they have not been made more definite by the briefs before this court."

The Supreme Court of the State of Washington also held that, when the contention is that perjury was committed by a witness (R. 80):

> " . . . it is for the jury to decide which witnesses, if any, are to be believed."

Thus, it appears that the Supreme Court of the State of Washington, after having reviewed all of the facts as alleged in the affidavits, briefs and arguments of each side, as well as the findings and conclusions of the trial court, came to the conclusion either that the petitioners were precluded as a matter of law from appealing upon the basis they alleged, or that they had failed to clearly indicate what is intended by their allegations of error, in violation of the case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959).

The Supreme Court of the State of Washington, in the case of *In re Grady v. Schneckloth*, 51 Wn. (2d) 1, 314 P. (2d) 930 (1957), held that the State of Washington had never required the statement of facts on appeal to contain a stenographic transcript of the entire evidence taken in the trial court. The Supreme Court of the United States denied certiorari. *Grady v. Rhay*, 357 U.S. 939, 2 L. Ed. (2d) 1554, 78 S. Ct. 1391 (1958).

The Supreme Court of the State of Washington, in the case of *State v. Lewis*, 55 Wn. (2d) 665, 349 P. (2d) 438 (1960), held:

> "... if an indigent defendant is represented by counsel who defended him at the trial, he is not entitled to a statement of facts at public expense where the assignments of error are patently frivolous and where, as here, the furnishing of a statement of facts would result in the waste of public funds."

It should be borne in mind that petitioners never contended that the facts, as set forth in the findings of the trial court, were untrue or inaccurate and did not challenge the correctness of those findings (R. 78).

The petitioners indicate at page 21 of the Brief of Petitioners that, if a free statement of facts is provided for all indigent defendants who request it, the cost to the State will be of little consequence. However, when the cost of printing a record, as indicated on page 18 of Petitioners' Brief, is compared with petitioners' statement, on page 15 of their brief, to the effect that at least fifty percent of all defendants are indigent defendants, it becomes obvious the conclusion reached by the petitioners that "the cost to the State of employing a court reporter to transcribe his notes is inconsequential . . ." is an inaccurate statement. If the State of Washington is not permitted to segregate the frivolous appeals from the non-frivolous appeals prior to the preparation of a free statement of facts

and, when fifty percent of the vast number of defendants before the courts need only allege that the evidence is insufficient to support the conviction in order to draw upon the public treasury, even though their claim is made in total bad faith or their cause is absolutely hopeless as a matter of law, then this certainly will provide a serious drain upon the treasury of this State.

The extent to which one defendant may pursue litigation at the expense of the State is indicated in a letter from the petitioner, Mr. Draper, to the Honorable Robert C. Finley, Chief Justice of the Supreme Court of the State of Washington, in which letter the petitioner stated (R. 74):

> "I believe my affidavit of pauperis is complete. The fact that I have been recognized in five courts should dispell argument on that point."

It is suggested that there is a remedy for those who insist on pursuing frivolous litigation, but, if this remedy by way of dismissal occurs after the preparation of a costly statement of facts, it cures nothing. The case of *In re Woods v. Rhay*, 54 Wn. (2d) 36, 338 P. (2d) 332 (1959), seeks to eliminate patently frivolous appeals before this expense is incurred, and yet, at the same time, requires only a minimal showing of good faith on the part of the indigent defendants.

CONCLUSION

The case of *In re Woods v. Rhay, supra*, provides a method whereby the State of Washington can insure to indigent defendants a statement of facts with which to appeal if a slight showing of good faith is made and, at the same time, deprives the trial court of the ability to arbitrarily deny an indigent defendant a free statement of facts with which to prosecute the appeal. This process equates the restrictions existing with respect to a monied defendant with the lack of any restriction respecting a defendant who asks the state to pay for this record. The State of Washington thereby protects its treasury without denying Due Process of Law or Equal Protection of the Laws to these petitioners. The respondents request that the relief sought by the petitioners be denied and that the decision of the Supreme Court of the State of Washington remain in full force and effect.

Respectfully submitted,

JOSEPH J. REKOFKE
JOHN J. LALLY, Prosecuting Attorney
GEORGE A. KAIN, Deputy Prosecuting Attorney

Attorneys for Respondents